No. 16166.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILO M. TURNER,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of Milo M. Turner, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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Jurisdictional Statement.

The jurisdictional statement set forth in the Appellant's Opening Brief, on pages 1 and 2 thereof, is substantially correct and the Appellee incorporates the same herein by reference as fully as if set forth in detail herein.

Statement of the Case.

The Appellant's Statement of the Case set forth on pages 3 and 4 of the Appellant's Opening Brief, is also substantially correct, however, the Appellee is of the opinion that it lacks sufficient detail and the Appellee will supplement the same herein without repeating the facts recited by the Appellant, which the Appellee repeats and incorporates herein by reference as fully as if set forth in detail herein.

Prior to the filing of the individual bankruptcy of the bankrupt, the bankrupt, who was the president, sole shareholder, sole director and managing officer of a California corporation named "Zipco, Inc.," caused to be filed the bankruptcy of Zipco, Inc. [See Finding of Fact No. 1, Referee's Findings of Fact, Conclusions of Law and Order Denying Discharge of the Bankrupt, dated February 25, 1958; and see Tr. pp. 128-156] and in the initial proceedings before Referee Head on May 2, 1957 at 2:00 P.M. as set forth in the Supplemental Transcript of Record, the proceedings were continued solely for the purpose of producing an original of the financial statement involved. [See Supp. Tr. pp. 200-201.] At no time during the entire proceedings before Referee Head, did the bankrupt or his counsel make any objections as to the sufficiency of the pleadings before the Court, and on the contrary proceeded on the merits. [See Supp. Tr. of Rec. pp. 156-202.]

Issues Involved.

The Appellee is of the opinion that the only issue involved is as follows:

(a) Whether or not the Findings of the Referee and of the District Court are unsupported by the evidence and clearly erroneous.

ARGUMENT.

The Findings of the Referee and of the District Court Should Not Be Reversed Unless Clearly Erroneous.

See:

Gold v. Gerson, 225 F. 2d 859 (C. A. 9, 1955).

The facts in this case were so flagrant that the District Court on review in its Memorandum Opinion (see Designation of Contents of Record on Appeal) states:

> "It is the opinion of this Court that if this bankrupt is entitled to a discharge, that everyone who files a petition should automatically receive a discharge. It is true that the denial of a discharge always works a hardship upon the bankrupt. This is one of the most flagrant cases of this type that has been called to my attention. . . ."

The Order of the District Court affirming the Referee on Review, approves and incorporates the Findings of Fact, Conclusions of Law and Order of the Referee. A portion of the Appellant's brief is devoted to arguments on the facts and it is submitted that the record is replete with evidence upon each and every element necessary to the Trustee's cause in sustaining the Specifications of Objection to the Discharge of this bankrupt.

The bankrupt admitted that he executed the financial statement and that he transmitted it over his signature to Mr. Stemmler of Vanadium Alloys Steel Co. This document was duly admitted into evidence. [See Tr. pp. 61-62.] The bankrupt also admitted that he did not own $166,559.00 worth of listed stocks and bonds listed in the financial statement. [See Tr. p. 63, lines 12-16 and 23-25.] The bankrupt further admitted that he and his

wife did not own the stocks and bonds in question. [See Tr. p. 63, line 27, to p. 64, line 21½; p. 65, lines 1-4.] The bankrupt further admitted that the unlisted stocks and bonds listed in the financial statement were not of the value set forth in the financial statement. [See Tr. pp. 65-67, where the bankrupt admitted that various corporations became defunct and in particular see p. 67, lines 1-13.] The bankrupt admitted that he did not own the house. [See Tr. p. 67, lines 14-21.]

There was adequate evidence that Vanadium Alloys Steel Co. relied upon the financial statement of the bankrupt, and further relied upon his personal guarantee of the obligations of Zipco, Inc., when advancing credit in connection with Zipco, Inc. [See testimony of Mr. Stemmler commencing Tr. p. 14, and see p. 19, lines 1-17], wherein it is testified that Turner was clearly notified that Vanadium Alloys Steel Co. would not furnish credit to Zipco, Inc., without Turner's personal financial statement and guarantee. [See Tr. pp. 21-41, pp. 32-35, pp. 48-52.] In short, the record is replete with evidence sustaining the various Findings of the Referee and of the District Court.

The Bankrupt's Testimony Was Impeached and It Is Elemental That the Testimony of a Witness Who Gives False Testimony in Part, May Be Disbelieved as to the Whole.

At numerous places in the record the bankrupt gave conflicting testimony and was thoroughly and completely impeached by contradictory testimony given on December 17, 1956. [See Tr. pp. 129-152, and see Referee's Opinion, set out at p. 153], wherein the Referee finds:

> "the Court's opinion and conclusion is that the bankrupt's recollection was certainly as good, if not better.

on December 17, 1956, when he testified in the matter of Zipco, Inc., and certainly at that particular time the bankrupt was not testifying in his own behalf and confronted by objections to his discharge as he is in the present matter, and therefore he would have no motive at that time to favor his testimony to the extent that he might possibly have at this particular date."

The Bankrupt Waived Any Objections He Might Have to the Sufficiency of the Pleadings by Participating in the Hearing on the Merits.

The Supplemental Transcript of Record setting out the proceedings of May 2, 1957, found at pages 156 to 203, will reveal that the only objections made by the bankrupt in a proceedings on the merits in this matter, were objections to an oral motion made to amend the Specifications of Objection to Discharge. It is submitted that the bankrupt participated in a full scale hearing on the merits in the matter, and cannot at the late date of a stipulated rehearing of the matter, then raise objections as to the sufficiency of the pleadings and argue the same on appeal.

Specification 2-a of the Specifications in question read as follows:

> "That the bankrupt made various financial statements, in writing, upon (underscoring supplied) which he obtained money for property on credit, or an extension or renewal of credit, and that the said financial statements were false, and among said financial statements were the false in the following particulars: (a) Financial Statement of October 27, 1955 . . ."

While the language used in the said Specification is not the exact language contained in Section 14-c(3) of the

Bankruptcy Act, it would stretch one's imagination to believe that the language "upon which he obtained money or property on credit" does not fairly imply both that the money was advanced upon the representations contained in the financial statement and that the bankrupt actually obtained credit based upon the financial statement. Cases cited by the Appellant and the encyclopedia cited at pages 2 and 3 of the Appellant's Opening Brief relate to matters which must be proved and do not rule that each and every element must be pled in the language or elements outlined in the Appellant's Opening Brief or in his Points and Authorities. A reading of each and every of the cases cited by the Appellant at this point will reveal that none of these cases go so far as to hold that a pleading which is substantially in the language of the Bankruptcy Act is insufficient.

If the trial court had been of the opinion that the pleadings were insufficient, it is certain that the pleadings were sufficient to grant a motion to amend the pleadings. It will be noted that on page 122 of the Transcript the Trustee made an oral Motion to Amend to proof, and the Motion was denied on the basis that the pleadings were adequate.

If a Rule Exists That Any Doubts in the Interpretation of Evidence Should Be Resolved in Favor of the Bankrupt, Such Rule Would Not Apply to the Facts in the Instant Case.

The Appellant makes the startling observation at page 10 of the Appellant's Brief, that the amount of evidence necessary to deny a discharge is the same degree necessary to sustain a conviction in a criminal matter. Conveniently, the Appellant fails to cite any cases to substantiate this rather startling proposition. The argument, that

to deny a discharge of a bankrupt works great hardship and that without a discharge a bankrupt cannot live, etc., as found on pages 10 and 11 of the Appellant's Brief, is the sort of an argument directed to appeal to the emotions of the Court rather than to elucidate upon and elaborate upon the law as it exists. This type of argument needs no answer as the very cases cited by the Appellant hold that the Bankruptcy Act is designed to relieve an honest debtor from the weight of his debts. See the very quote on page 11 of the Appellant's Brief, quoting *Local Loan Co. v. Hunt,* 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230, is to the effect: "One of the primary purposes of the Bankruptcy Act is to relieve the honest debtor from the weight of oppressive indebtedness and to permit him to start afresh, free from the obligations and responsibilites consequent upon business misfortunes." The same applies to *Williams v. U. S. Fidelity and Guarantee Co.,* 236 U. S. 549, 35 S. Ct. 289, 59 L. Ed. 713, which likewise holds that the Bankruptcy Act gives the honest but unfortunate debtor an opportunity to start life again, unhampered by the pressure and discouragement of pre-existing debts.

One has but to examine the Specifications of Objection to the Discharge of the Bankrupt, wherein it is specifically alleged that the bankrupt obtained credit upon a financial statement which was materially false, to discover that the cause of this discharge being barred, was that the bankrupt was not an honest bankrupt. In the various examinations of the bankrupt his answers were evasive, and his demeanor on the witness stand was not such as to impress the Court. As heretofore stated, *supra,* the bankrupt's testimony was impeached by contradictory testimony given on December 17, 1956. The principal witness of the bankrupt was his own wife and it is submitted that even

her testimony was unbelievable. See further contradictory testimony of the bankrupt at pages 70, 71 and 72 of the Transcript of the Record wherein the bankrupt contradicts prior sworn testimony given on May 2, 1957, at 2:00 P. M. At page 84 of the Transcript Mrs. Turner testifies that she purchased all of the furniture and furnishings prior to the time that she married Mr. Turner. At page 85 Mrs. Turner was asked whether or not linens and personal effects had not worn out in the period of some years which had expired since they were purchased, and on page 86 she testified that none of her linens had worn out between 1949 and 1956. [See Tr. p. 86, lines 9-19.] It is submitted that it is simply unbelievable that in a period of some seven years none of the linens of the bankrupt's wife wore out or were replaced, and it is further submitted that the entire record amply demonstrates that this was not a so-called honest bankrupt.

The entire argument found on pages 12, 13 and 14 of the Appellant's Opening Brief is simply that the testimony of the bankrupt and of his witnesses should be believed, and the testimony of Mr. Stemmler should be disbelieved. Even if the stipulated testimony of Stanley Sorenson were believed by the Court, it is merely to the effect that in the first meeting the bankrupt stated that he had invested the assets in Zipco, Inc., and that the remaining assets belonged to Mrs. Turner. This was proven to be false when the bankrupt admitted that Mrs. Turner did not own the assets but that a trust fund in favor of her mother owned the assets. The entire stipulation at no place conflicts with the testimony of Mr. Stemmler in that none of the various meetings are identified in relation to the time at which the financial statement and personal guarantee of the bankrupt were executed. The stipula-

tion would be irrelevant if the various discussions occurred after the credit were advanced in reliance upon the financial statement and personal guarantee of Turner. The stipulation is inconsistent in that although Sorenson repeats various conversations he allegedly heard, yet the stipulation admits that at no time did Sorenson hear Sorenson and Stemmler discuss the account being personally guaranteed by Turner. This would seem to indicate that all of the discussions took place long after the furnishing of the financial statement and the guarantee by Turner, and in this event the entire stipulation would be irrelevant.

No Error Was Committed When the Court Refused to Introduce the Contract Between Vanadium Alloys Steel Co. and Stemmler.

At page 36 of the Transcript the attorney for the bankrupt begins questioning Mr. Stemmler regarding his contract or agreement with Vanadium Alloys Steel Co., and on page 38 at line 6, testimony is given that this is not an executed copy but a true copy of an executed copy of the document. Commencing at line 21 of page 38 the Trustee's Objection is interposed:

> "I will object to the introduction of that document as no sufficient foundation. It has not been shown that the original is not available. This constitutes a copy which is unsigned. The signature has not been verified, and, in short, there has been no sufficient foundation for the introduction of this in evidence."

At line 5 of page 39 the objection to the document is sustained by the Referee. At page 13, commencing at line 9 of the Appellant's Brief, the Appellant now argues that there was error in the non-admission of the agreement into evidence. Conveniently, the Appellant cites no au-

thority to demonstrate that any error whatever was committed by the Referee and on the contrary argues the relevancy of the document. It is submitted that the objection was well taken under the Best Evidence Rule, that the document was neither signed nor was it a ribbon copy of the original, that the signature was not verified and the document was definitely inadmissible under the Best Evidence Rule, and for the reason that no sufficient foundation had been laid for the introduction of the document.

There Was No Variance Between the Pleadings and the Proof and if Such a Variance Existed the Same Was Waived by the Appellant.

Under the heading "the bankrupt waived any objections he might have to the sufficiency of the pleadings by participating in the hearing on the merits" the Appellee has amply demonstrated that on May 2, 1957, the bankrupt wholly participated in a hearing on the merits, allowed testimony to come in regarding all matters which he now objects to as a variance, that no objections were made as to any variance from the pleadings at that time, and that having once participated on the merits, the bankrupt has waived any objections as to a variance or to the form of the pleadings. During the long time which expired subsequent to the filing of the pleadings and service thereof, and the stipulated rehearing before Referee Rifkind, after once participating on the merits, the bankrupt made no attempt to object to the pleadings or to object to the introduction of testimony upon the pleadings as drawn. It is submitted that the bankrupt should now be estopped to raise any objections to the sufficiency of the pleadings or in connection to variances, if any, from the pleadings.

It has been demonstrated above, and in the Statement of Facts, that the bankrupt was the sole shareholder,

managing officer, sole officer and director of Zipco, Inc., at the time the credit was furnished by Vanadium Alloys Steel Co. In addition, it has been demonstrated that Vanadium Alloys Steel Co. requested the personal guarantee of the bankrupt and clearly informed that bankrupt that credit would not be extended unless her personally guaranteed the account. It was further demonstrated that the bankrupt did execute a written guarantee of the account and in connection therewith furnished his personal financial statement. This placed the bankrupt in substantially the same position as a co-signer of a note as by his guarantee he was personally liable for the debt which arose by the furnishing of credit to Zipco, Inc. Once again, the Appellant fails to cite any case authority for the reason that it is probable that none exists in his favor, when he argues that it was not proven that any credit was furnished to the bankrupt personally. We submit that the record amply demonstrates that the credit was furnished solely upon the personal guarantee of Mr. Turner and that this is tantamount to selling the goods directly to Turner.

At page 15 of the Appellant's Brief, the Appellant cites Section 469 of the Code of Civil Procedure of the State of California but overlooks the portion thereof which reads "has actually mislead the adverse party to his prejudice . . ." In the rehearing of the matter, how could the Appellant have been misled when he had already tried the entire matter once on May 2, 1957 [see Tr. pp. 156-202], and the Appellee's theory of the case had been presented to the Court. We submit that under these circumstances a variance, if any, would have been immaterial under the very code sections cited by the Appellant.

At page 16, commencing at line eight and one-half, the Appellant argues that it is necessary under the law to

establish not only that credit was extended, but to establish that the bankrupt received a benefit directly or indirectly as an officer, director and shareholder of the corporation concerned, and that a finding must be made of the nature and extent of his shareholder interest. Again, conveniently, no case authority is cited for the simple reason that this simply is not the law. This argument furthermore overlooks the fact that the credit extended here was clearly credit extended upon the personal guarantee of the bankrupt, and this credit was extended directly to the bankrupt rather than merely furnished to a corporation in which he had an interest. We know of no reason in the law why the bankrupt must have received a benefit directly or indirectly under the facts of the instant matter. In addition, as hereinbefore argued, it was amply demonstrated that the sole party in interest in the bankrupt corporation was the bankrupt himself, and the record will show that the reviewing District Court Judge remanded the matter for the purpose of conducting an additional hearing relating to the specific point of the interest of the bankrupt in Zipco, Inc.

In re Leichter, 197 F. 2d 955 (C. A. 3, 1952), cert. den. 344 U. S. 914, cited by the Appellant on page 17 of the Appellant's Brief, has no application to the instant case as that was a case where the financial statement regarding the corporation's assets was furnished by the president of the corporation to a creditor. No personal guarantee by the president was involved, nor was there any sufficient proof as to the interest which the president had in the corporation. In the within case the financial statement involved was a financial statement relating to individual assets of the bankrupt and not to the assets of the corporation of which he was a part owner, and the financial statement in the *Leichter* case was furnished as

an officer of the corporation, as distinguished from the personal financial statement of the bankrupt. No findings were made regarding the stock ownership of the bankrupt for the very reason that any such Findings would have been immaterial under the facts of this case where the bankrupt made a personal financial statement and personally guaranteed the account when in reliance upon his personal guarantee and personal financial statement the credit was extended to the corporation.

No Error Was Committed in Connection With the Remanded Hearing.

On page 18. commencing at line 11, the Appellant makes the unfounded statement "that the sole evidence of the Trustee at the hearing on remand . . ." and on page 17 intimates that the Order on Remand was not complied with. At pages 17 and 18 of the Transcript may be found the Referee's Additional and Supplemental Findings of Fact which were signed and entered on May 16, 1958, which the Appellee will hereinafter demonstrate were completely supported by many items of evidence.

The very application for the issuance of stock which was introduced by the Appellant as an exhibit in connection with the remanded hearing, as set forth in the Findings of the Referee on page 18 of the Transcript of the Record, sets out in paragraph 2 thereof that Milo M. Turner was the president of the bankrupt, and was the real party in interest and in active charge of the business at the time of the application for the issuance of the stock. At Transcript page 129, line 8, Turner admits that he was the president of the corporation, and at line 9 admits that from October 27, 1955, to the date of the filing of the Petition in Bankruptcy he was the president. That on page 130 of the Transcript, commencing at line 3 and

continuing through line 20, Turner admits that he was the president and carried out the administration of the concern and that he signed all of the checks that were issued by the corporation. Commencing at page 131 and continuing to page 133, the bankrupt admits that on December 17, 1956, he testified that he was the president of Zipco, Inc., that he was in active charge of the management of the company, that all of the stock of the corporation was issued to him and that no stock was issued to any other person, and, commencing at line 25 of page 135 and continuing on page 136 the bankrupt exhibits an amazing lack of memory concerning the affairs of the bankrupt, and on page 137, Transcript, admits that he was the president on October 27, 1955. At page 139, Transcript reference is made to the application for issuance of stock, and on page 143, Transcript, and page 144, the application is offered and received into evidence at page 146, Transcript; commencing at line 23½ and continuing on to pages 147 *et seq.,* the bankrupt admits that no stock was issued to his mother-in-law Anna Stoffregen, that the prospective investors objected to the issuance of stock to his mother-in-law, that any investments were set up as notes with a right to convert to stock, and that none of the prospective investors ever elected to exercise an option to convert to stock. In short, the record is replete with testimony which would tend to show that at the time of the making of the financial statement Turner was the president, sole director, sole managing officer, and sole shareholder of the bankrupt corporation.

Conclusion.

We respectfully submit that while the Appellant sets forth some eight Specifications of Errors, he fails to sustain any one of the same. A reading of the Appellant's Brief leaves one with the impression that he proposes several novel theories of law, concluding that the burden of proof in connection with objections to discharge of a bankrupt is the same as that required in criminal matters, and that when credit is advanced to a bankrupt or to a corporation which he owns, based on his personal financial statement and personal guarantee of the corporation's obligations, he receives no benefit from the furnishing of credit, and each of these various arguments conveniently is unsupported by case authority for the reason that no such authority exists. The Appellant also argues that the testimony of the bankrupt should be believed for the reason that a stipulated statement might tend to corroborate him. This is purely and simply an argument on the sufficiency of the evidence and we respectfully submit that the evidence as demonstrated by the Transcript of the Record clearly demonstrates that each and every Finding of the Referee and of the District Court is amply and abundantly supported by the record.

We therefore respectfully submit that no error has been demonstrated by this Appellee, and that the Orders, Findings of Fact and Conclusions of Law of the District Court and Referee in Bankruptcy should be affirmed.

Respectfully submited,

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